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82-904

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSTRUCTORA EL MONTE, S.A., BENITO MONTEMAYOR, EVA MONTEMAYOR, MATIAS MONTEMAYOR, and CARMEN MONTEMAYOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL J. GUINAN
GEORGE E. BECKER
39 South LaSalle Street
Chicago, Illinois 60603
(312) 236-2803
Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err when it dismissed the Petitioners'[1] appeal from a jury verdict and judgment entered in a forfeiture case, brought under 21, U.S.C., Sec. 881(a)(6), on the jurisdictional grounds that Notice of Appeal was filed prior to the disposition of pending pretrial motions in violation of F.R.A.P. 4(a)(4), when said Notice of Appeal was filed within 10 days from the trial court's entry of judgment for forfeiture, which partially granted and partially denied the Petitioners' pending post-trial motions that had been filed 42 days before entry of judgment?

---

[1] Benito Montemayor, Eva Montemayor, Matias Montemayor, Carmen Montemayor, and Constructora El Monte, S.A., a Mexican corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSTRUCTORA EL MONTE, S.A., BENITO MONTEMAYOR, EVA MONTEMAYOR, MATIAS MONTEMAYOR, and CARMEN MONTEMAYOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Constructora El Monte, S.A., Benito Montemayor, Eva Montemayor, Matias Montemayor, and Carmen Montemayor hereby petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1982 and the subsequent denial of a Petition for Rehearing on October 12, 1982.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 8, 1982 (No. 82-2020). The United States Court of Appeals denied a petition for rehearing on October 12, 1982. The opinion is not reported in the Federal Reporter Second Series pursuant to Circuit Rule 28 and accordingly the court's order is printed in the Appendix at page 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 1) was entered on September 8, 1982 dismissing petitioner's appeal from the judgment entered by the United States District Court for the Southern District of Texas, Brownsville Division on January 6, 1982 pursuant to F.R.A.P. 4(a)(4). A petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on October 12, 1982. (App. 3) The jurisdiction of this Court is involved under and pursuant to 28 U.S.C., Sec. 1254(1).

STATUTES INVOLVED

F.R.A.P. 4(a)(2) of 28 U.S.C. provides:

"Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

F.R.A.P. 4(a)(4) of 28 U.S.C. provides:

"If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b); to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

F.R.A.P. 4(a)(5) of 28 U.S.C. provides:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) . . ."

F.R.A.P. 4(b) of 28 U.S.C. provides:

"APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in

the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion . . ."

F.R.C.P. 59(b) of 28 U.S.C. provides:

"Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

F.R.C.P. 59(e) of 28 U.S.C. provides:

"Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

F.R.C.P. 79(a) of 28 U.S.C. provides:

"Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administration Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable . . . All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made."

STATEMENT OF THE CASE

On April 28, 1981 agents of the United States Drug Enforcement Administration entered the homes of petitioners at bar and seized real property and various items of personal property belonging to them. Other items of personal property belonging to petitioners were seized by drug agents on the same date at other locations.

Subsequent to the seizures, the government filed four separate complaints requesting that the real and personal property seized from Benito and Eva Montemayor be forfeited to the government, the personal property seized from Matias and Carmen Montemayor be forfeited, and that an airplane seized from a Mexican Corporation, Constructora El Monte, S.A., be forfeited, all under authority of Chap. 21, U.S.C., Sec. 881(a)(6).

On motion of the government, the four separate complaints were consolidated for trial. Even though the instant case proceeded from trial to present with seized horses as the named defendant, several parties claiming varied items of real and personal property are the actual interested parties.

On November 16, 1981 trial on the complaints for forfeiture was commenced before a jury, and on November 19, 1981 the jury returned a verdict against petitioners. On November 25, 1981 the judgment motion to amend judgment, motion for judgment notwithstanding the verdict, and a motion for instructed verdict. On December 16, 1981 the government filed a response to post-trial motions. Without any notice, the trial court on January 5, 1982 entered a final judgment of forfeiture. (App. 23) Upon learning of the final judgment, petitioners filed their notice of appeal on January 11,

1982. On January 18, 1982, the trial court denied, by written order, petitioners' post-trial motions. No record of the written order appears on the docket sheet (App. 11-23), and no notice of the written order or its filing was ever sent to the attorney for the petitioners. (App. 11-23)

Since the trial court's final judgment of forfeiture was dichotomized, returning property to claimants contrary to the court's and jury's findings, the petitioners conclusively presumed that the final judgment was a denial in part and a granting in part of petitioners' post-trial motions. The notice of appeal was filed notifying all necessary parties that an appeal was to be taken only as to the property that the court ordered forfeited to the government.

On May 17, 1982 a brief was filed for claimants-appellants, and on June 23, 1982 the government-appellee filed its brief. Both appellants and appellee urged the Fifth Circuit Court of Appeals to grant oral argument since the case at bar was one of first impression. Issues were raised concerning 21, U.S.C., Sec. 881(a)(6) which had not been addressed previously by an Appeals Court, and several jurisdictions throughout the United States anxiously awaited an interpretation of this new and important statute.[2]

After petitioners filed a reply brief, the Fifth Circuit Court of Appeals on its own motion dismissed the instant appeal on the grounds that the filed Notice of Appeal was a nullity because it was filed prior to disposition of post-trial motions. A petition for rehearing was filed by petitioners, but that petition was denied on October 12, 1982.

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[2] Chap. 21, U.S.C., Sec. 881(a)(6) was enacted and became law on November 11, 1978 and no case of any real merit had reached an Appeals Court.

REASONS FOR GRANTING THE WRIT

A.

THE TRIAL COURT RULED ON AND DISPOSED OF ALL PENDING POST-TRIAL MOTIONS WHEN IN ITS FINAL JUDGMENT ORDER IT GRANTED PART OF THE RELIEF SOUGHT BY RETURNING SOME OF THE SEIZED PROPERTY TO CLAIMANTS AND DENIED THE MOTIONS IN PART BY ORDERING FORFEITURE OF OTHER SEIZED PROPERTY.

In a forfeiture case brought under Chap. 21, U.S.C., Sec. 881(a)(6), the government has the initial burden of showing probable cause for the seizure, *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983 (5th Cir. 1980). At the point that the government established probable cause, the burden shifts to the claimant to show that the property in question is not subject to forfeiture. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978).

On November 16, 1981 a jury trial was commenced, and at issue was the seizure by drug agents of a house, airplane, horses, household furniture, and other varied items of personal property from several separate and distinct parties. At the close of the government's case, the trial court entered an order finding probable cause for all the seizures. On November 19, 1981 at the close of all the evidence, the jury found for the government and against the petitioners and the verdict was filed.

On November 25, 1982 the petitioners filed a motion for new trial, to vacate the judgment, to amend judgment, for judgment notwithstanding the verdict, and for instructed verdict. (App. 18) On December 16, 1981 the government filed a reply to all post-trial motions asking for forfeiture of all seized property.

On January 5, 1982 forty-two (42) days after filing of motions, the trial court entered a final judgment. The final judgment granted part of the relief sought in the post-trial motions when court ordered horses, cars, furniture, jewelry and many other items of personal property returned to the petitioners. (App. 4) This was contrary to the court's finding of probable cause and the jury verdict.

The court quite clearly denied the petitioners' post-trial motions in part, when it ordered the seized house, airplane, and various items of personal property forfeited to the government. In light of the well considered, lengthy, dichotomized judgment, the claimants conclusively presumed that the trial court had ruled on and disposed of all pending post-trial motions.

Notice of Appeal was filed on January 11, 1982. (App. 23). On January 18, 1982, the trial court filed a written order denying petitioners' post-trial motions. No copy of this order or notice of filing was ever sent to petitioners' attorneys, and no record of its filing appeared on the original docket sheet. (App. 11-23) The petitioners' attorneys first learned of the written order when the Fifth Circuit Court of Appeals dismissed the instant appeal *sua sponte*.

The denial of a motion by a District Court, although not formally expressed may be implied by the entry of final judgment or an order inconsistent with the granting of the relief sought by motion. The final judgment or inconsistent order is in effect a ruling on all pending motions. *Addington v. Farmer's Elevator Mutual Insurance Company*, 650 F.2d 663 (5th Cir. 1981); *Agostino v. Ellanor Packing Company*, 191 F.2d 576 (9th Cir. 1951); *Mosier v. Federal Reserve Bank of New York*, 132 F.2d 710 (2nd Cir. 1942). The Fifth Circuit Court of Appeals

chose to ignore its decision in *Addington*, a case directly on point and inconsistent with this opinion.

The determination of a motion is not always express, but may be implied. Thus the entry of an order inconsistent with granting the relief sought is a denial of the motion. So, also, the entry of final judgment in a cause is in effect an overruling of all motions pending prior thereto in the case. *Cohen v. Curtis Publishing Company*, 333 F.2d 974 (8th Cir. 1964), *cert. denied*, 380 U.S. 921, 85 S.Ct. 923 (1965).

The facts in *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981) and the case at bar are virtually similar. *Calhoun* filed Notice of Appeal prior to the entry of an order denying his Rule 59 Motion, and motion was made to dismiss his appeal for the reason his Notice of Appeal was a nullity. Resolution of the issues involved consideration of F.R.A.P. 4(a)(2) and (4). Rule 4(a)(2) provides:

> "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order, but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

This amendment was designed to avoid the loss of the right to appeal by the filing of a notice of appeal prematurely. Absent the "except as provided" language of Rule 4(a)(2), the Notice of Appeal in this case would clearly be timely, having been filed after announcement of the judgment, although before formal entry of a separate order denying the motion.

The *Calhoun* court stated as follows:

> "Because of the 'except as provided' language of Rule 4(a)(2), we must consider the requirements of Rule 4(a)(4), which provide:

> "If a timely motion . . . is filed . . . the time for appeal shall run from the date of entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new Notice of Appeal must be filed within the prescribed time measured from the entry of the order. . . ."

We hold that the word "disposition" means announcement of the court's decision on the motion. This interpretation does not defeat the purpose of amending the rule. There is no significant possibility that a premature filing of a Notice of Appeal is likely to involve wasted effort or that the Notice of Appeal would not embrace objections to the denial of the post-judgment motion. Once a decision is announced, under Rule 58, an order should be prepared and entry should summarily follow.

An interpretation of the word "disposition" as meaning "announcement" of a decision gives meaning to the policy of "exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." See *Williams v. Town of Okobojo*, 599 F.2d 238, 239-40 (8th Cir. 1979), quoting *Markham v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966); see also *Anderson v. Allstate Insurance Company*, 630 F.2d 677, 681 (9th Cir. 1980). So construed, Rule 4(a)(4) is consistent with the purpose of Rule 4(a)(2), making ineffective only those notices of appeal filed before "announcement of a decision or order."

A contrary interpretation of Rule 4(a)(4) is fraught with injustice. A party may believe that an order has been made and entered when a decision is announced or filed and may act promptly to take an appeal, only to

find that the order was actually entered a day or two later. If Rule 4(a)(4) is interpreted to mean that the filing of a Notice of Appeal is a nullity because filed before formal entry of an order and if the time for filing a motion for extension of time based on excusable neglect has run, (see F.R.A.P. 4(a)(5)) valuable rights may be lost because an important, but ministerial, act was not performed when expected.

The distinctions between announcement of a decision, the filing of a judgment or order, and the entry of a judgment or order should not be utilized to create an abyss into which early appeals fall without effect. It would be contrary to the spirit of the rules to interpret the word "disposition" as meaning the date of a formal and proper entry of an order denying a post-judgment motion. We therefore hold that the Notice of Appeal was not a nullity under Rule 4(a)(4)."

B.

SINCE ALL POST-TRIAL MOTIONS REQUESTING RELIEF FROM THE JURY VERDICT AND TRIAL COURT'S ERRORS WERE FILED PRIOR TO ENTRY OF FINAL JUDGMENT, THEY WERE NULLITIES AND NOT PENDING WHEN NOTICE OF APPEAL WAS FILED.

Petitioners find it necessary to present this argument, as an alternative to Argument I, to demonstrate the frivolity of the Fifth Circuit Court of Appeals order dismissing the instant appeal. The Appeals Court used an unreasonably strict interpretation of F.R.A.P. 4(a)(4) to dismiss the appeal. Rule 4(a)(4) states that a Notice of Appeal filed before the dispostion of a timely filed petitrial motion shall have no effect. If the same rationale were followed, then the conclusion must be reached that a post-trial motion untimely filed would also have no ef-

fect and be a nullity. Therefore, all claimants' post-trial motions were nullities because they were filed prior to the trial court's final judgment entered on January 5, 1981.

Following the Appeals Court's reasoning, a review of the record would show:

November 19, 1981—
Trial court had found probable cause and the jury verdict was returned. (App. 22)

November 15, 1981—
Petitioners filed post-trial motions, but in accordance with Appeals Court's reasoning, no final judgment had been entered, and therefore the post-trial motions were premature and a nullity.

January 5, 1981—
Trial court enters written judgment. Since the prematurely filed post-trial motions were a nullity and not pending, nothing could extend the statutory and jurisdictional time for filing Notice of Appeal.

January 11, 1982—
Petitioners filed Notice of Appeal. No post-trial motions were pending to toll time for filing Notice of Appeal. (App. 23)

January 18, 1982—
Trial court enters order denying petitioners' post-trial motions. Since the filed post-trial motions were premature and a nullity, the trial court's order was a nullity and could not preempt and toll the time for filing Notice of Appeal. (App. 23)

Where no judgment has been entered, one cannot file post-trial motions attacking the judgment yet to be rendered. In *Friedman v. Typhoon Air Conditioning*, 31 F.R.D. 287 (E.D.N.Y. 1962) the court held that:

> "While Rule 59(e) provides that motions to alter a judgment must be served not later than 10 days after entry of the judgment, this limitation is not applicable here since no judgment had been entered when post-trial motions were filed. F.R.C.P. 58 provides that a judgment is not effective until noted in the civil docket as provided by F.R.C.P. 79(a)."

An untimely filed post-trial motion does not toll the running of the period for filing Notice of Appeal. *Browder v. Director Illinois Department of Corrections*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed. 2d 521 (1978); *United States v. Valdosta-Lowndes County Hospital Authority*, 668 F.2d 1177 (11th Cir. 1982). Contrary to the rationale of the Appeals Court, the *Valdosta* court held that the only practical way to avoid this clear injustice is to construe Rule 4(a)(4) as predicated entirely on a timely filing of post-trial motions. It should be noted that the Eleventh Circuit evolved from the old Fifth Circuit. The Eleventh Circuit held it was bound by the holdings of the former Fifth Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). And, the history of the Fifth Circuit supports the position that if a post-trial motion was timely filed after a premature Notice of Appeal, the trial court could rule on the motion without making the Notice of Appeal a nullity. *United States v. Crescent Amusement*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160 (1944). *Consor v. Occidental Life Insurance Company of California*, 469 F. Supp. 110 (N.D. Tex. 1979).

While the petitioners firmly believe that the issues presented to this Court should be decided in accordance with the rationale propounded in Argument A, the alternative argument presented herein highlights the inconsistent rationale of the Appeals Court. To conclude that the petitioners' Notice of Appeal was a nullity be-

cause it was filed prior to a ruling on post-trial motions, and then conversely conclude that untimely filed post-trial motions (*arguendo*) were not a nullity and were pending when the final judgment was entered is unreasonable.

C.

FUNDAMENTAL FAIRNESS AND EQUITABLE PRINCIPLES MANDATE ALL UNITED STATES COURTS OF APPEAL TO UNIFORMLY CONSIDER THE JURISDICTIONAL REQUIREMENTS OF F.R.A.P. 4.

Arguments A and B notwithstanding, the most reasonable and expeditious way in which to approach and dispose of the question presented in this petition is with a sense of fundamental fairness and exercise of equitable principles. To do otherwise would be a perversion of a just legal system and unreasonably punish the petitioners for a hypothetical, technical violation of the Federal Rules of Appellate Procedure. The petitioners had suffered through the seizures of homes, cars, and other valuable items of personal property, and then, after a trial presented critical first impression issues involving 21 U.S.C., Sec. 881(a)(6) for review, the United States Drug Enforcement Administration, prosecutors and defense attorneys throughout the country eagerly awaited an interpretation and opinion of a patently vague statute.

Prior to the 1979 Amendment to F.R.A.P. 4(a)(4), an appeal would not have been dismissed for the premature filing of notice of appeal unless prejudice was shown by a party and substantial rights were affected. *Stokes v. Peytons Inc.*, 508 F.2d 1287 (5th Cir. 1975). The Fifth Circuit overruled the *Stokes* decision in *Williams v. Bolger*, 633 F.2d 410 (5th Cir. 1980), holding that F.R.A.P. 4(a)(4) required strict statutory interpretation.

At the same time many other circuits looked to the old Fifth Circuit for guidance and chose to treat a failure to comply with the specifics of Rule 4(a)(4) as non-jurisdictional and apply equitable principles. The court in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3rd Cir. 1981) looked upon the default in filing as non-jurisdictional due to a substantial forfeiture that would result and the absence of prejudice to the appellee. The Third Circuit further has noted its discretion under F.R.A.P. 4(a)(2), to suspend the requirements or provisions of the rules in a particular case.

The only parties that suffer from the dismissal of the appeal of the case at bar on the hypothetical technical jurisdictional issue under Rule 4(a)(4) are the petitioners. The United States Government never suffers when justice is done properly. The government could only benefit, especially when one considers the importance of the issues raised in appellant's brief.

The appeal involves a crucial question regarding the government's actions under the forfeiture statute 21, U.S.C., Sec. 881(a)(6). The government seized the property in this case using a novel theory under the subject statute, i.e., the net worth theory. No Appellate Court has ruled on the constitutionality of such a theory. Numerous courts are looking to the Fifth Circuit for guidance on this issue of seizures under 881(a)(6). While the instant appeal was pending before the Fifth Circuit, the government seized other property using the same novel theory.

While the Fifth Circuit deviated from the original Fifth Circuit's rulings regarding Rule 4(a)(4), other circuits now rely on the former Fifth Circuit's holding in *Markham v. Holt*, 369 F.2d 940 (5th Cir. 1966). The Ninth Circuit has adhered to the *Markham* policy of ex-

ercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged, not because something was done too late, but rather because it was done too soon. The Eighth Circuit upheld an appeal using equitable principles in a similar holding in *Williams v. Town of Okoboji*, 599 F.2d 238 (8th Cir. 1979).

Before a Notice of Appeal is ruled a nullity under F.R.A.P. 4(a)(4) the Appellate Court should also consider F.R.A.P. 4(a)(2). It provides in pertinent part:

> "Except as provided in (a)(4) of this Rule 4, a Notice of Appeal filed after the announcement of a decision or order, but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

The rule was designed to avoid the loss of the right to appeal by the filing of a Notice of Appeal prematurely. The committee comments further provide:

> "The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal prematurely. Despite the absence of such a provision in Rule 4(a), the Courts of Appeals quite generally have held premature appeals effective."

Additional consideration should be given by this court to the fact that a forfeiture case is quasi-criminal in nature. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). There is also a great deal of authority that considers a forfeiture case criminal in nature rather than quasi-criminal due to the horrendous deprivation of property rights that result from a forfeiture action. F.R.A.P. 4(b) provides that a Notice of Appeal filed after the announcement of a decision in a criminal case, but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MICHAEL J. GUINAN
GEORGE E. BECKER
39 South LaSalle Street
Chicago, Illinois 60603
(312) 236-2803
Attorneys for Petitioners

December 1, 1982

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2020
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEN (10) HORSES, ET AL.,

Defendants,

CONSTRUCTORA EL MONTE, S.A., ET AL.,

Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(SEPTEMBER 8, 1982)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

RUBIN, Circuit Judge:

A final judgment of forfeiture was filed on January 5, 1982, but this does not dispose of the pending post-verdict motions. While these motions were still pending, on January 11, 1982, the claimants to the property involved filed a notice of appeal from the judgment of forfeiture.

A week later, on January 18, 1982, the several post-verdict motions were denied, and no subsequent notice of appeal has been filed.

Rule 4(a)(4), Fed. R. App. P., states:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect.*

(Emphasis supplied).

The notice of appeal in the present case is precisely what Rule 4(a)(4) declares to be null. Beam v. Youens, 664 F.2d 1275, 1276 (5th Cir. 1982); Williams v. Bolger, 633 F.2d 410, 412 (5th Cir. 1980). Because this error is jurisdictional, the Court may notice it sua sponte. *See* United States v. Kalish, ... F.2d ..... (5th Cir. July 23, 1982, nos. 80-1704, 80-1716, slip p. 3911, 3922); Save the Bay, Inc. v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1981).

For these reasons the appeal is DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2020

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

TEN (10) HORSES, ET AL.,

Defendants,

CONSTRUCTORA EL MONTE, S.A., ET AL.,

Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(October 12, 1982)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/s/ F. B. VELA
United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

FINAL JUDGMENT OF FORFEITURE

(Filed January 5, 1982)

Based on the evidence presented at trial and in accordance with the jury verdict returned November 19, 1981, the Court hereby enters a Final Judgement of Forfeiture as to all of the property described below as follows:

A. One (1) Sorrel Quarter Horse Mare, AQHA #282899 (named Levan Bars);
B. One (1) Sorrel Quarter Horse Filly (Colt of Levan Bars);
C. One (1) Brown Quarter Horse Mare, AQHA #345994 (named Hopetowin);
D. One (1) Piper Navajo, PA-31 with Mexican Registration No. XB-ADE;
E. Lot Fifty-three, Parkland Estates Subdivision, City of McAllen, Hidalgo County, Texas, Referenced—Volume 16, Page 60, Map Records (BENITO and EVA MONTEMAYOR'S House

and lot), otherwise known as 2412 North First Street, McAllen, Texas;

F. Furniture and other chattels, taken from the house of Matias and Carmen Montemayor, of which the Drug Enforcement Administration had specific knowledge prior to the execution of the warrants in this case, as shown by the testimony at trial.

G. Furniture and other chattels, taken from the house of Benito and Eva Montemayor, of which the Drug Enforcement Administration had specific knowledge prior to the execution of the warrants in this case, as shown by the testimony at trial.

All other property referred to in the complaints and the attached appendices is DISMISSED from this cause of action and should be returned to the Claimants forthwith.

Furthermore, it is ORDERED that no sale of the forfeited property should take place pending appeal of this cause.

All court costs are hereby taxed against the Claimants.

Signed for entry on this the 5th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

ORDER

(Filed January 18, 1982)

Upon consideration of the Claimants' Motion to Amend the Judgment, this Court finds that said motion is without merit and should be DENIED.

It is so ORDERED.

Signed for entry on this the 18th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

(Attestation omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

ORDER

(Filed January 18, 1982)

Upon consideration of the Claimants' post-trial Motion to Vacate the Judgement, this Court finds that said motion has no merit and should be DENIED.

It is so ORDERED.

Signed for entry on this the 18th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

(Attestation omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

ORDER

(Filed January 18, 1982)

Upon consideration of the Claimants' post-trial Motion For New Trial, this Court finds that said Motion has no merit and should be DENIED.

It is so ORDERED.

Signed for entry on this the 18th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

(Attestation omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

ORDER

(Filed January 18, 1982)

Upon consideration of Claimants' Motion for Instructed Verdict, this Court finds that said motion is without merit and should be DENIED.

It is so ORDERED.

Signed for entry on this the 18th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

(Attestation omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-81-125 Consolidated with:
B-81-126, B-81-127, B-81-128

UNITED STATES OF AMERICA,

Plaintiff,

VS.

TEN (10) HORSES, ETC.,

Defendants.

ORDER

(Filed January 18, 1982)

Upon consideration of Claimants' Motion for Judgement Notwithstanding the Verdict, this Court finds that said motion is without merit and should be DENIED.

It is so ORDERED.

Signed for entry on this the 18th day of January, 1982.

/s/ FILEMON B. VELA
United States District Judge

(Attestation omitted in printing.)

TRIAL COURT DOCKET ENTRIES
(No. B-81-125)

PLAINTIFFS	DEFENDANTS
UNITED STATES v. OF AMERICA	TEN (10) HORSES, described as as follows:
	1) ONE (1) SORREL QUARTER HORSE MARE, AQHA #282899;
	2) ONE (1) SORREL QUARTER HORSE FILLY, (colt of #282899);
	3) ONE (1) BROWN QUARTER HORSE MARE, AQHA #345944;
CONSOLIDATED WITH B-81-126, B-81-127 and B-81-128	4) ONE (1) BAY QUARTER HORSE STALLION, AQHA #1274313;
	5) ONE (1) GREY QUARTER HORSE MARE, AQHA #1071786;
	6) ONE (1) SORREL QUARTER HORSE GELDING, AQHA #586325;
	7) ONE (1) GREY QUARTER HORSE GELDING, AQHA, #1383433;
	8) ONE (1) SORREL QUARTER HORSE STUD, (colt of #301934);
JURY REQUESTED	9) ONE (1) PALOMINO GELDING, star face with white mane and tail;
	10) ONE (1) SORREL QUARTER HORSE MARE, AQHA UNKNOWN, white hair at base of tail, right rear hock, left rear pastern, star, strip and snip.

CAUSE—28 USC 1345; 1355; 21 USC 846 Forfeiture of property purchased w/monies obtained through the sale of narcotics. 21 USC 881(a)(6), 21 USC 841.

ATTORNEYS

FOR PLAINTIFF:

Jose A. Berlanga, Assistant
UNITED STATES ATTORNEY
P. O. Box 61129
Houston, Texas 77208
713/226-4745

FOR DEFENDANTS:

f/Matias Montemayor,
Carmen Montemayor, &
Linda Montemayor

Michael J. Guinan
39 South LaSalle Street
Suite 1005
Chicago, Illinois 60603
312/236-2802

Matias Morin, Jr.
400 East University
Edinburg, Texas 78539
512/383-5641

f/Manuel Ayala

Reynaldo G. Garza, Jr.
GARZA & GARZA
680 East St. Charles #300
Brownsville, Texas 78520
512/541-4914

5/22/81 [1] Pltf's COMPLAINT FOR FORFEITURE, filed. JURY REQUESTED. lm

5/22/81 [2] Pltf's MOTION TO APPOINT SUBSTITUTE CUSTODIAN, filed. lm

5/22/81 [3] Pltf's MEMORANDUM IN SUPPORT OF MOTION TO APPOINT SUBSTITUTE CUSTODIAN, filed. lm

6/3/81 [4] Received MAGISTRATE'S PROCEEDINGS, Affidavit, Search Warrant and Return and filed. lm

6/5/81 [5] ANSWER TO COMPLAINT FOR FORFEITURE, filed. lm

6/5/81 [6] REPLY TO GOVERNMENT'S MOTION TO APPOINT CUSTODIAN AND MOTION TO ENJOIN GOVERNMENT, filed.

6/9/81 [7] PETITION FOR REMISSION, filed of Manuel Ayala. lm

6/10/81 WARRANT OF SEIZURE AND MONITION issued and handed to U.S. Marshal. lm

6/11/81 [8] Pltf's MOTION FOR INTERLOCUTORY SALE, filed. M/D 6/29/81 lm

6/12/81 [9] (FBV) ORDER APPOINTING SUBSTITUTE CUSTODIAN, filed. Drug Enforcement Administration substituted as custodian. U. S. Marshal and all counsel ntfd. lm

6/12/81 [10] Original ANSWER of Allen Taylor, filed. lm

6/15/81 [11] (FBV) ORDER, filed. Hearing on all motions pending and other pre-trial matters set June 22, 1981 at 8:30 A.M. Counsel Nftd. oha

6/17/81 [12] Deft's APPLICATION FOR CHANGE OF VENUE, filed. oha M/D 7/20/81

Numbers in brackets following file dates refer to the district court's record item numbers.

6/18/81 [13] Pltf's MOTION TO STRIKE PETITION FOR MITIGATION FILED BY MANUEL AYALA, filed. M/D 6/29/81 lm DD 6/22/81

6/22/81 [14] Pltf's MOTION FOR LEAVE TO FILE INTERROGATORIES, filed. M/D 7/6/81 lm

6/22/81 [15] Pltf's RESPONSE TO MOTION TO ENJOIN GOVERNMENT, filed. lm

6/22/81 HEARING PASSED until Wednesday, June 24, 1981 at 1:30 p.m. lm

6/24/81 [16] MARSHAL'S RETURN ON WARRANT OF SEIZURE and MONITION executed June 17, 1981 by publishing Monition once in the McAllen Monitor on June 21, 1981, filed. lm DD 6/25/81

6/24/81 [17] HEARING ON FORFEITURE—MINUTES, filed. Appearances: Jose A. Berlanga f/govt and Michael J. Guinan and Matias Morin f/defts. Govt moves that these cases should be consolidated. Court will take this under advisement. This case is reset for hearing on forfeiture on July 23, 1981 at 9:00 a.m. Set for final pre-trial on July 27, 1981 at 1:30 p.m. and jury selection on July 29, 1981 at 9:30 a.m. (Ct. Rptr.: B. Holloway) lm DD 6/25/81

7/1/81 [18] MARSHAL'S RETURN on MONITION executed June 25, 1981 by publishing monition one time in the Brownsville Herald, filed. lm DD 7/2/81

7/1/81 Pltf's NOTICE OF DEPOSITION of the following:

7/1/81 [19] Matias Montemayor on July 13, 1981, filed.

7/1/81 [20] Benito Montemayor on July 14, 1981, filed.

7/1/81 [21] Matias Morin, Jr. on July 15, 1981, filed.

7/1/81 [22] Eva Montemayor on July 15, 1981, filed.

Numbers in brackets following file dates refer to the district court's record item numbers.

7/1/81 [23] Constructora el Monte, S.A. on July 16, 1981, filed. lm

7/16/81 [24] Pltf's MOTION TO COMPEL DISCOVERY OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER, filed. lm

7/16/81 [25] STIPULATION (US to delay filing forfeiture complaints w/respect to 10 motor vehicles until July 30, 1981), filed. lm

7/22/81 [26] Pltf's MOTION FOR SANCTIONS UNDER RULE 37 and MEMORANDUM IN SUPPORT, filed. lm

7/22/81 [27] Pltf's MEMORANDUM IN SUPPORT OF GOVERNMENT'S REQUEST FOR A JURY TRIAL, filed. lm

7/23/81 [28] (FBV) SHOW CAUSE HEARING—MINUTES filed. Appearances: AUSA, Jose Berlanga and Angie Flores; Michael J. Guinan and Matias Morin f/claimants. Court rules that seizure is constitutional. Hearing as to the seizure. Two of Plft's witnesses testify. Both sides close. Seizure—there was probable cause in the seizure on some items. Court will write an order to the items of seizure and the items to be released. Motion date is set for Sept. 19, 1981. Final pre-trial set for Sept. 29, 1981 at 1:30 p.m. Jury selection set for Nov. 2, 1981 at 9:30 a.m. (Ct. Rptr.—B. Holloway) lm DD 7/30/81

8/3/81 Received proposed order on motion for consolidation. lm

8/3/81 [29] Plft's MOTION TO RECONSIDER, filed. M/D 8/17/81 lm DD 8/6/81

8/5/81 [30] Copy of REPORTER'S TRANSCRIPT OF PROCEEDINGS on July 23, filed. lm DD 8/6/81

Numbers in brackets following file dates refer to the district court's record item numbers.

8/25/81 [31] (FBV) ORDER, filed. Parties Nftd. oha DD 8/26/81 This case is consolidated with C.A. B-81-126, B-81-127 and C.A. B-81-128, and that the pleadings in said actions stand as the pleadings in said consolidated action, to be carried under C.A. B-81-125.

9/4/81 [32] Pltf's MOTION FOR DEFAULT DECREE AND FINAL JUDGMENT OF FORFEITURE, filed. oha M/D 9/21/81

9/9/81 [33] (FBV) ORDER, filed. Parties Ntfd. oha Any item purchased prior to Nov. 10, 1978 or any item that the government did not substantiate was purchased after that date, either by direct testimony at the hearing or by reference to documentation or transactions testified to in the hearing, must be released promptly by the government.

9/21/81 [34] Plfts' SECOND MOTION FOR SANCTIONS UNDER RULE 37, OR, IN THE ALTERNATIVE, TO COMPEL DISCOVERY, filed. DD 9/23/81 mer

9/18/81 [35] Plfts' MOTION TO CONSOLIDATE, filed. DD 9/23/81 mer

9/18/81 [36] Plfts' NOTICE OF DEPOSITION, filed. DD 9/23/81 mer

9/18/81 [37] Plfts' NOTICE OF DEPOSITION, filed. DD 9/23/81 mer

9/23/81 [38] CERTIFICATE OF NON-APPEARANCE, by Terry Gill at Deposition on July 2, 1981, filed.

9/25/81 [39] CERTIFICATE OF NON-APPEARANCE, by Terry Gill at Deposition on July 2, 1981, filed.

9/29/81 [40] (FBV) PRE-TRIAL HEARING MINUTES, filed. Appearances: Jose A. Berlanga f/pltf. and Michael J. Guinan and Matias Morin, Jr. f/defts.

Numbers in brackets following file dates refer to the district court's record item numbers.

Motion to Consolidate (81-195) Court to rule later. Motion for forfeiture is denied. Motion for Sanctions—taken care of. As to 5th Amendment on deposition—Court to rule later. Set for FPT-October 29, 1981 at 1:30 p.m. Jury Selection—Nov. 2, 1981 at 9:00 A.M. DD 10/1/81 mer

10/19/81 [41] NOTICE OF DEPOSITION of Constructora El Monte, S.A. on October 21, 1981 at 1:00 a.m., filed. DD 10/22/81 mer

10/19/81 [42] NOTICE OF DEPOSITION of John Kwak on October 23, 1981 at 9:00 A.M., filed. DD 10/22/81 mer

10/19/81 [43] NOTICE OF DEPOSITION of Calvin Cagan on October 23, 1981 at 11:00 a.m., filed. DD 10/22/81 mer

10/19/81 [44] NOTICE OF DEPOSITION of Dominic Rossi, Jr. on October 22, 1981 at 3:00 P.M., filed. DD 10/22/81 mer

10/19/81 [45] NOTICE OF DEPOSITION of Laura Ciente on October 23, 1981 at 2:00 p.m., filed. DD 10/22/81 mer

10/19/81 [46] NOTICE OF DEPOSITION of Innocente Padron on October 22, 1981 at 5:00 p.m., filed. DD 10/22/81 mer

10/23/81 Returned Answers to Interrogatories to Attorney Matias Morin, Attorney for Defts. as they do not comply with Local Rules.

10/23/81 [47] NOTICE OF DEPOSITION, of Rudy Tamez, filed. mer

10/23/81 [48] Pltf's MOTION FOR LEAVE TO TAKE DEPOSITION, filed. mer

10/26/81 [49] (FBV) ORDER, filed. All counsel ntfd. 10/27/81 mer Deposition of Rudy Tamez to be taken in Federal Correctional Institution at Bastrop, Texas on October 27, 1981 at 1:00 p.m.

Numbers in brackets following file dates refer to the district court's record item numbers.

10/26/81 [50] Defts' MOTION FOR ORDER REQUESTING GOVERNMENT TO PRODUCE WITNESSES FOR DEPOSITION, filed. DD 10/27/81 mer

10/26/81 [51] Defts' MOTION FOR JUDGMENT DENYING GOVERNMENT'S MOTION FOR LEAVE TO TAKE DEPOSITION OF RUDY TAMEZ, filed.

10/28/81 [52] PLAINTIFF'S MOTION TO STRIKE ANSWERS OF CLAIMANTS MONTEMAYOR AND CONSTRUCTORA EL MONTE, S.A. AND FOR JUDGMENT OF FORFEITURE, filed.

10/28/81 [53] SUPPLEMENT TO MOTION FOR SANCTIONS AS TO CONSTRUCTORA EL MONTE, S.A., filed.

10/28/81 [54] PLAINTIFF'S MOTION TO STRIKE ANSWER OF MATEO SILVA AND FOR JUDGMENT OF FORFEITURE, filed. mer

10/29/81 [55] (FBV) FINAL PRE-TRIAL MINUTES, filed. Ct.Rptr. Bill Holloway Appearances: Jose A. Berlanga f/pltf. and Michael J. Guinan f/defts. This case is set for Jury Selection on November 2, 1981 at 9:00 A.M. mer

10/29/81 [56] DEPOSITION OF DOMINIC ROSSI, JR., filed.

10/29/81 [57] DEPOSITION OF MANUEL MONTEMAYOR, filed.

10/29/81 [58] DEPOSITION OF BENITO MONTEMAYOR, filed.

10/29/81 [59] DEPOSITION OF CALVIN CAGAN, filed.

10/29/81 [60] DEPOSITION OF INNOCENTE PADRON, filed.

10/29/81 [61] DEPOSITION OF JOHN KWAK, filed.

Numbers in brackets following file dates refer to the district court's record item numbers.

11/2/81 [62] DEPOSITION OF RODOLFO TAMEZ, FILED.

11/2/81 [63] AMENDED APPENDIX I, filed. DD 11/3/81 mer

11/2/81 [64] (FBV) JURY SELECTION MINUTES, filed. Ct. Rptr. Bill Holloway Appearances: Jose Berlanga f/Plft. and Michael J. Guinan f/defts. All parties present Jury Selected, not sworn. This case is set for trial on Nov. 16th, 1981 at 9:00 A.M. This is a 5 day case. Set before Judge Vela.

11/2/81 [65] Charge to the Jury, filed.

11/2/81 [66] Plft. requested interrogatories to the Jury, filed.

11/2/81 [67] Pltf. proposed questions for Voir Dire of the Jury Panel by the Court, file. Interrogatories will be filed by deft. later today or within 3 days. DD 11/3/81 mer

11/2/81 [68] DEPOSITION OF MANUEL MONTEMAYOR DE LA PAZ, filed. DD 11/3/81 mer

11/6/81 [69] Defts' AMENDMENT TO RULE 41 MOTIONS, filed. mer

11/6/81 [70] Defts' AMENDMENT TO RULE 41 MOTIONS, filed. mer

11/6/81 [71] Defts' AMENDMENT TO RULE 41 MOTIONS, filed. mer

11/6/81 [72] Defts' MOTION TO VACATE ORDER OF CONSOLIDATION, filed. oha

11/6/81 [73] Defts' MOTION TO ACCOUNT FOR SEIZED PROPERTY, filed. oha

11/6/81 [74] Defts' MOTION TO RETURN PROPERTY IN ACCORDANCE WITH COURT ORDER, filed. oha

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Numbers in brackets following file dates refer to the district court's record item numbers.

11/13/81 [75] DEPOSITION OF MARIA DEL CARMEN CASTILLO MONTEMAYOR, filed. oha

11/13/81 [76] DEPOSITION OF ORFELINDA MONTEMAYOR, filed. oha

11/13/81 [77] DEPOSITION OF EVA FRANCES MONTEMAYOR, filed. oha

11/16/81 [78] (FBV) JURY TRIAL MINUTES, filed. Ct. Rptr. Bill Holloway Appearances: Jose A. Berlanga, AUSA and Guinan, Salinas and Morin f/defts. Deft. and Jurors are present for Jury trial. Jury sworn. Jury out. Deft. Motions Amendment to Rule 41 Motions, filed.

11/16/81 [79] Pre-trial Order, filed.

11/16/81 [80] Plaintiff's requested Interrogatories to the Jury, filed.

11/16/81 [81] Motion in Limine, filed.

11/16/81 [82] Motion in Limine, filed.

11/16/81 [83] Motion in Limine, filed.

11/16/81 [84] Motion in Limine, filed.

11/16/81 [85] Motion to Sanction Government and Suppress Testimony of Surprise Witness, filed.

11/16/81 [86] Motion In Limine, filed.

11/16/81 [87] Motion in Limine & Motion to Quash & Suppress Evidence, filed.

11/16/81 [88] Motion in Limine & Motion to Quash & Suppress Evidence, filed.

11/16/81 [89] Motion to Sanction Govt & Suppress Testimony of Surprise Witness, filed.

11/16/81 [90] Motion in Limine, filed.

11/16/81 [91] Motion in Limine & Motion to Quash & Suppress Evidence, filed.

Numbers in brackets following file dates refer to the district court's record item numbers.

11/16/81 [92] Motion to Sanction Govt & Suppress testimony of Surprise Witness, filed.

11/16/81 [93] Motion to Sanction Govt. & Suppress Testimony of Surprise Witness, filed.

11/16/81 Govt Witnesses—II Deposition of Dominic Rossi, Jr. con't with 3rd witness. Court recess til Tuesday November 17, 1981 at 9:00 A.M.

11/17/81 [94] (FBV) JURY TRIAL MINUTES, filed. Ct. Rptr. Bill Holloway Appearances: Jose A. Berlanga and George Nachtigall, AUSA Michael Guinan, Homer Salinas and Matias Morin f/defts.

11/17/81 2ND DAY JURY TRIAL Con't with Gov't Witnesses—Motion to Dismiss Complaint & Enter Judgment for Claimants, filed. Govt Witnesses—8 Witnesses—Court finds probable cause.

11/17/81 [95] Testimony of Frank Tuccie, filed—Jury out.

11/17/81 [96] Testimony of Carlos Gutierrez, filed. Respondents Witnesses: 1 Court recess til Wednesday, November 17, 1981 at 9:00 A.M.

11/18/81 [97] (FBV) JURY TRIAL MINUTES, filed. Ct. Rptr. Bill Holloway Appearances: Jose A. Berlanga and George Nachtigall, AUSA and Michael Guinan, Homer Salinas and Matias Morin f/defts.

11/18/81 3RD DAY JURY TRIAL Deposition of John B. Powell, filed. Respondents' continue with Witnesses: 5 witnesses. Govt rebuttal Witnesses: 2 Witnesses. All side close at this time 3:30 p.m. Court recess til Thursday Nov. 19, 1981 at 9:00 A.M.

11/19/81 [98] Claimant's Requested Interrogatories to the Jury, filed.

11/19/81 [99] Claimant's Requested Interrogatories to the Jury, filed.

Numbers in brackets following file dates refer to the district court's record item numbers.

11/19/81 Arguments of counsel—Govt 9:05-9:45 a.m. Respondents 9:45-10:30 a.m. Charge of the Court—10:30-10:45 a.m. Jury given the case at 10:55 a.m.

11/19/81 [100] (FBV) Order for meal for Jury, filed.

11/19/81 [101] Jury back at 3:45 p.m. Verdict as to Interrogation 1 A-G is yes, filed. Verdict for the Govt.

11/19/81 [102] Exhibit List, filed.

11/19/81 [103] Exhibit List, filed.

11/19/81 [104] Charge to the Jury, filed.

11/19/81 [105] Pretrial Memorandum, filed.

11/25/81 [106] Deft's MOTION FOR NEW TRIAL, filed.

11/25/81 [107] Deft's MOTION TO VACATE THE JUDGMENT, filed.

11/25/81 [108] Deft's MOTION TO AMEND THE JUDGMENT, filed.

11/25/81 [109] Deft's JUDGMENT NOTWITHSTANDING THE VERDICT, filed.

11/25/81 [110] Deft's MOTION FOR INSTRUCTED VERDICT, filed.

11/30/81 Received Final Judgment of Forfeiture and Order of Sale and forwarded to Courtroom Deputy. mer

12/11/81 [111] Deft's MOTION TO DELAY SALE OF PROPERTY FORFEITED TO THE GOVERNMENT, filed. mer

12/11/81 [112] Deft's MOTION TO DELAY SALE OF PROPERTY FORFEITED TO THE GOVERNMENT, filed. mer

12/11/81 Received Proposed Judgment for Forfeiture and forwarded to Courtroom Deputy.

Numbers in brackets following file dates refer to the district court's record item numbers.

12/16/81 [113] Plft's RESPONSE TO CLAIMANTS' POST-TRIAL MOTIONS, filed. DD 12/17/81 mer

1/95/82 [114] (FBV) FINAL JUDGMENT OF FORFEITURE, filed. All counsel ntfd. DD 01/06/82 mer

1/06/82 [115] (FBV) ORDER, filed. All counsel ntfd. District Clerk shall allow the Government to substitute copies of documents introduced into evidence in this case, so that the originals may be used in a related criminal prosecution. mer

1/6/82 [116] RECEIPT FOR WITHDRAWAL OF EXHIBIT, filed. DD 01/07/82 mer

1/6/82 Special Agent, D.E.A. withdrew Gov't Exhibit #4A, a tape recording

1/11/82 [117] Deft's NOTICE OF FILING, filed. og DD 1/11/82

1/11/82 [118] Deft's NOTICE OF APPEAL, filed. og DD 1/11/82

1/11/82 [119] Description OF PARTS OF TRANSCRIPTION APPELLANTS INTEND TO INCLUDE IN THE RECORD AND STATEMENT OF THE ISSUES THEY INTEND TO PRESENT ON APPEAL, filed. og DD 1/11/82

(Attestation Omitted In Printing.)

Numbers in brackets following file dates refer to the district court's record item numbers.

Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-904

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONSTRUCTORA EL MONTE, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the prematurity of petitioners' notice of appeal deprived the court of appeals of jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-904

CONSTRUCTORA EL MONTE, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1982 (Pet. App. 1-2). A petition for rehearing was denied on October 12, 1982 (Pet. App. 3). The petition for a writ of certiorari was filed on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in a civil forfeiture action in the United States District Court for the Southern District of Texas, certain items of petitioners' property were adjudged subject to forfeiture under 21 U.S.C. (Supp. V) 881(a)(6). The court of appeals thereafter dismissed petitioners'

appeal from the forfeiture order, ruling that the notice of appeal was ineffective under Fed. R. App. P. 4(a)(4) because it had been filed prior to the disposition of various post-verdict motions (Pet. App. 1-2).

1. The evidence established that petitioners had no significant wealth before they began trafficking in illegal drugs. The former spouses of petitioners Matias and Benito Montemayor both worked to support their families, and the families were always short of cash (6 Tr. 54). Petitioners Matias and Benito Montemayor inherited no wealth from their mother (GX 23-27), and federal investigators were unable to locate any employment records for Matias Montemayor until he and his brother opened a small, unprofitable grocery store in Cook County, Illinois, in 1974 (6 Tr. 57, 59). Petitioner Constructora El Monte, S.A., a Mexican construction company, was founded by the Montemayor brothers in March 1979, with assets of only $2,200 (6 Tr. 61).

Beginning in 1978, petitioners made purchases that could not have been funded from their legitimate financial resources. Those purchases included the property forfeited in the present case: a Piper Navajo airplane purchased on December 22, 1978, for $241,000 (6 Tr. 66; 9 Tr. 468-471); a house located in McAllen, Texas, purchased in November 1978 for $223,000 in cash (6 Tr. 65; 9 Tr. 481; GX 16); the quarter horses Levan Bars and Hopetowin, purchased on May 31, 1979, and a foal born in 1980 (8 Tr. 205-206); furniture purchased on November 15, 1978, for $18,000 in cash (7 Tr. 64-65); and patio furniture purchased in May 1980 for $2,736.30 in cash (8 Tr. 292, 297).

The evidence established that the source of funds for these expenditures was an extensive narcotics trafficking operation that included the manufacture of heroin in Mexico for importation to the United States, and distribution of

heroin, cocaine, and marijuana in Illinois, Texas, and elsewhere, under the direction of petitioners Benito and Matias Montemayor and their brothers (7 Tr. 12-23, 40-57, 81-100, 122-148; 8 Tr. 319-357; see *United States* v. *Montemayor*, 666 F.2d 235, 236-237 (5th Cir. 1982)). Petitioner Constructora El Monte, S.A., was used to "cover up" the illicit profits and activities of the narcotics operation (8 Tr. 354).

2. On November 25, 1981, six days after the jury's verdict for the government, petitioners filed motions to vacate the judgment, amend the judgment, for an instructed verdict, for judgment notwithstanding the verdict, and for a new trial (Pet. App. 22). On December 16, 1981, the government filed a response to the post-trial motions (*id.* at 23). The trial court entered a final judgment of forfeiture on January 5, 1982 (*id.* at 4-5, 23). On January 11, 1982, while the post-trial motions were still pending, petitioners filed a notice of appeal from the judgment of forfeiture (*id.* at 1, 23). The trial court denied petitioners' post-trial motions by written orders filed January 18, 1982, and entered on the docket sheet the following day (*id.* at 6-10; Lodging 8).[1] Petitioners did not file any subsequent notice of appeal (Pet. App. 2).

3. The court of appeals sua sponte dismissed the appeal after appellate briefs had been filed by all parties (Pet. App. 1-2), on the ground that petitioners' notice of appeal was

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[1]For the convenience of the Court, we are lodging with the Clerk a certified copy of the complete docket sheet of the district court in this case, mailed to counsel for the government by the Clerk, United States District Court for the Southern District of Texas, on January 7, 1983. The docket sheet shows the entries of the trial court's orders denying petitioners' post-trial motions, which [redacted] are omitted from petitioners' appendix (Pet. App. 11-23).

untimely under Fed. R. App. P. 4(a)(4).[2] The court explained (Pet. App. 1) that the trial court's final judgment of forfeiture "[did] not dispose of the pending post-verdict motions." Accordingly, petitioners' notice of appeal, filed during the pendency of the motions, was "precisely what Rule 4(a)(4) declares to be null" (Pet. App. 2). Because the error was jurisdictional, the court of appeals concluded (*ibid.*) that it could notice it sua sponte.

ARGUMENT

Petitioners contend (Pet. 7-17) that the court of appeals acted improperly in dismissing their appeal.[3] That contention is clearly incorrect in light of this Court's decision in *Griggs* v. *Provident Consumer Discount Co.*, No. 82-5082 (Nov. 29, 1982). In *Griggs*, as in this case, a notice of appeal

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[2]Fed. R. App. P. 4(a)(4) states (emphasis supplied):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment [notwithstanding the verdict] under Rule 50(b);(ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;(iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.* No additional fees shall be required for such filing.

[3]We have been informed that petitioner Benito Montemayor remains a fugitive following his indictment on November 17, 1981, in the Southern District of Texas for narcotics offenses related to this case. A fugitive petitioner in a criminal case is not entitled "to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970). A fugitive from a criminal conviction should similarly be disentitled to receive judicial consideration of an appeal in a related civil case.

was filed while a post-trial motion was still pending and thus was premature under Fed. R. App. P. 4(a)(4). The Court noted that, by its plain terms, Rule 4(a)(4) states that such a premature notice of appeal "shall have no effect" and that a new notice of appeal "must be filed" after the disposition of post-trial motions (slip op. 5). The Court observed that it is "well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional' " (*ibid.*, quoting *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978)). Thus, unless a new notice of appeal is filed after disposition of post-trial motions, the court of appeals "lacks jurisdiction to act" (slip op. 5). In such a case the court has no discretion to waive the requirements of timeliness (*ibid.*). Thus, because petitioners here did not file a notice of appeal after the trial court denied their post-trial motions the court of appeals was required to dismiss their appeal.[4]

Petitioners contend (Pet. 7-11) that the "disposition" of their post-trial motions occurred when the trial court entered the final judgment of forfeiture on January 5, 1982, not when the trial court issued written orders denying the motions on January 18, 1982. That contention is without merit. The judgment of forfeiture (Pet. App. 4-5) on its face does not state or in any way even suggest that it was intended to encompass a ruling on the motions. The subsequent entry of the written orders, which expressly indicated that the motions had been found to be without merit (Pet. App. 6-10), confirms that the trial court did not intend the judgment of forfeiture to constitute a ruling on the motions.

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[4]In *Griggs* the Court remanded the case, apparently because the record failed to indicate whether a new notice of appeal had been filed after the disposition of the post-trial motion (slip op. 1-2, 6). No remand is required in the present case. The court of appeals found (Pet. App. 2), and the docket sheet indicates (see Lodging 8-9), that no subsequent notice of appeal was filed, and petitioners do not suggest otherwise.

The court of appeals recognized (Pet. App. 1) that the judgment of forfeiture did not dispose of the pending motions. See *Partridge* v. *Presley*, 189 F.2d 645, 646-647 (D.C. Cir.), cert. denied, 342 U.S. 850 (1951)(entry of judgment did not amount to denial of a pending motion for a new trial since there was no evidence that the court consciously disposed of the motion at the time the judgment was entered). See also *Director of Revenue* v. *United States*, 392 F.2d 307, 309-310 (10th Cir. 1968); *United States* v. *Pan American World Airways, Inc.*, 299 F.2d 74, 76 (5th Cir. 1962), rev'd on other grounds, 382 U.S. 25 (1965); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* para. 204.12[4], at 4-84 to 4-85 (2d ed. 1982).[5]

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[5]The cases cited by petitioners (Pet. 8-9) for the proposition that a final judgment may constitute a ruling on all pending motions involved circumstances that suggested that the courts in those cases in fact had ruled on the motions prior to entry of formal orders to that effect. See, *e.g.*, *Addington* v. *Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981) (trial court and counsel commented on impropriety of motion during hearing; no order expressly denying motion ever entered); *Calhoun* v. *United States*, 647 F.2d 6 (9th Cir. 1981) (denial of motion shown on minutes of court and on docket; no formal entry of separate order); *Mosier* v. *Federal Reserve Bank*, 132 F.2d 710 (2d Cir. 1942) (trial court had recorded denial of motion on motion papers at the time the decree dismissing the complaint was entered). No such circumstances are present in this case.

Petitioners' claim (Pet. 11-14) that their post-trial motions were nullities because they were filed prematurely also lacks merit. By their terms, the rules governing motions for judgment notwithstanding the verdict, for a new trial, and to amend a judgment require that the motion be served "*not later than* 10 days after" the entry of judgment. Fed. R. Civ. P. 50(b), 59(b) and (e) (emphasis supplied). Thus, the rules do not forbid such motions prior to the formal entry of judgment. See *American Security Bank, N.A.* v. *John Y. Harrison Realty, Inc.*, 670 F.2d 317, 321 (D.C. Cir. 1982); *Smith* v. *Hudson*, 600 F.2d 60, 62 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); *Douglas* v. *Union Carbide Corp.*, 311 F.2d 182, 184 (4th Cir. 1962); see also 6A J. Moore, *Moore's Federal Practice* para. 59.09(1), at 59-221 (2d ed. 1982) (footnote omitted) (wording of Rule 59(b) was designed to be "broad enough to permit the motion to be made both before and after the entry of the judgment").

Petitioners' claim (Pet. 6, 8) that "[n]o copy of [the trial court's January 18, 1982, orders denying their post-trial motions] or notice of filing was ever sent to petitioners' attorneys, and no record of [their] filing appeared on the original docket sheet" is contradicted by the record. The docket sheet included in petitioners' appendix (Pet. App. 11-23) omits entries after January 11, 1982.[6] The complete docket sheet in this case, which we have lodged with the Clerk of this Court, shows (Lodging 8) that the trial court's orders denying the post-trial motions were entered on the docket sheet on January 19, 1982, and that, in the case of four of the five orders, all counsel were notified.[7]

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[6]Petitioners do not indicate the date on which they obtained the copy of the docket sheet that is reproduced at Pet. App. 11-23.

[7]Petitioners cite no evidence in support of their contention (Pet. 6, 8) that, contrary to the information on the docket sheet, no notice of the filing of the orders denying the post-trial motions was sent to their attorneys. We are advised by the United States Attorney that the government appears to have received copies of the orders on January 25, 1982. In connection with the petition for rehearing in the court of appeals, petitioners' Illinois attorneys submitted an affidavit stating that they had received notification of denial of the motions for the first time when they received a copy of the court of appeals' decision (Petition for Rehearing, Exhibit II, at 9a). However, petitioners submitted no affidavits from their local Texas counsel, who also represented them at the trial stage. See Pet. App. 12. Even if petitioners had established that notice of entry of the orders had never been given to counsel, this would not affect the time within which they could appeal. See Fed. R. Civ. P. 77(d).

In any event, any contention by petitioners that they are entitled to relief by virtue of lack of notice of the district court's action depends in part on factual assertions that cannot possibly be resolved by this Court on the present record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

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